

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NGIA LEE,

Defendant-Appellant.

UNPUBLISHED

March 20, 2003

No. 236162

Oakland Circuit Court

LC No. 2000-175995-FC

Before: Markey, P.J., and White and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of assault with intent to do great bodily harm, MCL 750.84, one count of felonious assault, MCL 750.82, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of four years, nine months to ten years for each of the assault with intent to do great bodily harm convictions and 2-1/2 to 4 years for the felonious assault conviction, to be served consecutively to three concurrent two-year terms for the felony-firearm convictions. He appeals by right. We affirm.

Pao Moua testified that, at the Hmong celebration on October 1, 2000, four people approached Johnny Her and hit him. Moua said that he and Fong Yang “took off running” after he saw someone wearing black clothes pull “a black thing” out of his back pocket. They ran toward the parking lot and through a field. Moua testified that when he got to the field, he heard three gunshots that sounded like they were coming from the parking lot.

Nhia Lo testified that she was at the park for the Hmong New Year celebration and that at about 2:30 p.m., she heard “a pop” and then saw two Asian boys who were about sixteen or seventeen running. After this, she saw a man running who stopped and pointed a gun at the two boys. Lo identified defendant as the man with the gun and said that she saw him shoot two times. Then, she saw defendant run toward the two boys and heard about three more shots. Lo then heard someone calling out that the person’s daughter had been shot.

Dang Vue testified that he was at Pontiac Lake for the Hmong New Year with Lo. He heard and saw a young man fire two gunshots and then heard a baby cry. Vue specified that two Hmong males who looked between the ages of fifteen and seventeen ran past him very fast while a third man chased them from about fifty feet behind, that the third man stopped, pulled a gun “straight out at a 45-degree angle,” aimed in the direction of the two young males, fired twice,

and then continued running. Vue heard a baby's cry from the direction in which the gun was pointed. Vue identified defendant as the man who fired the gun.

Zoua Her testified that her three-year-old daughter Malena Her was with her at the Hmong celebration. Zoua said that Malena was shot during that event, but that she did not see the shooting.

Detective Frank Mostek testified that he interviewed defendant and that defendant admitted shooting the gun during the incident, but that defendant expressed that he was only trying to "scare them off." Detective Mostek read into the record the following statement that defendant had written:

When we to New Year we was talk to some of these guys, then we walked to the park. We saw these guys, they was walking straight in front of us. I was still smoking and next thing I know everybody was fighting and I started to run to the car. Then I told Kor to give me the gun because I was scared. I thought that if they catch me I was go to get beat—bee [sic] up so I fired two rounds to the back in the sky so that the group of guy that was run to us will run away so that I won't get bee [sic] up. I fire one more round to the side to the sky because they was two guys running close by my side. I sorry but I was scared. I did not mean to shoot somebody, I was just scared.

I

Defendant first argues that the trial court erred reversibly by denying his request for instructions on the cognate lesser misdemeanors of discharging a firearm causing injury while intentionally aimed without malice, MCL 750.235, and careless, reckless, or negligent use of a firearm causing injury, MCL 752.861.¹ However, in *People v Alter*, ___ Mich App ___; ___ NW2d ___ (Docket No. 228005, issued January 24, 2003), slip op at 3-4, this Court, in reversing the defendant's convictions for cognate lesser offenses, stated:

This issue is controlled by the Supreme Court's recent opinion in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). There, the Court reasoned that the statute on lesser offenses, MCL 768.32(1), does not authorize consideration of cognate lesser offenses. *Id.* at 353-359.

Further, the failure to give the instructions did not affect the outcome of the trial where the jury rejected the lesser offense of felonious assault with respect to two of the counts, and defendant admitted that he fired the gun to frighten off the victims.

¹ In pertinent part, defendant was tried on charges of three counts of assault with intent to murder. The firearm misdemeanors at issue are plainly, at most, cognate lesser offenses, not necessarily included lesser offenses, to assault with intent to murder because the misdemeanors necessarily require the involvement of a firearm while assault with intent to murder may, of course, be committed without a firearm.

II

Defendant next argues that there was insufficient evidence that he had an intent to do great bodily harm to support his two convictions of assault with intent to do great bodily harm. We disagree. In reviewing the sufficiency of the evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to decide if any rational factfinder could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). Assault with intent to do great bodily harm consists of (1) an attempt or threat with force or violence to do corporal harm to another (an assault) and (2) the intent to do great bodily harm. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Also, if a defendant tries to shoot (or otherwise physically assault) one person with a certain state of mind, but actually harms another person, the defendant's intent to harm may be "transferred" to the person who was actually harmed. Put more simply, if a defendant attempts to shoot person A with an intent to do great bodily harm to A, but the bullet actually hits person B, the defendant is guilty of assault with intent to do great bodily toward B under the doctrine of "transferred intent." See, e.g., *People v Plummer*, 229 Mich App 293, 304, n 2; 581 NW2d 753 (1998); *People v Lawton*, 196 Mich App 341, 350-351; 492 NW2d 810 (1992).

With regard to defendant's conviction of assault with intent to do great bodily harm based on the shooting of the child, Malena Her, two witnesses (Nhia Lo and Dang Vue) testified that they saw defendant pointing and shooting his gun at the park in the direction of two males. Further, Lo testified that after seeing defendant shoot twice, she saw him run in the direction of the two males and heard about three more shots. Minimal circumstantial evidence is sufficient to prove an actor's state of mind. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Because the testimony that defendant shot in the direction of the two males constituted far more than minimal circumstantial evidence that defendant intended to do great bodily harm to one or both of them, the evidence was sufficient to support a finding that defendant had that mental state when he fired the shots. Vue testified that after seeing the gunshots, he heard a baby cry from the direction that the gun was pointed and saw the baby bleeding from her head down. Zoua Her testified that Malena was shot at the park. Further, in defendant's written statement, as testified to by Detective Mostek, defendant referenced shooting with the intent to scare off "two guys." Considering all this testimony, there was sufficient evidence to support a conclusion that defendant shot with the intent to do great bodily harm to at least one person, and, as a result, inadvertently shot Malena. Under the doctrine of transferred intent, *Plummer, supra*; *Lawton, supra*, this was sufficient to support defendant's conviction of assault with intent to do great bodily harm.

With regard to defendant's conviction of assault with intent to do great bodily harm to victim Pao Moua, Moua testified that he and Fong Yang ran toward a parking lot and through a field. When they got to the field, he heard three gunshots that sounded like they were coming from the parking lot. Moua testified that four people had previously approached and hit Johnny Her. As discussed previously, in his written statement, defendant referenced being in or near fighting and firing a gun in relation to "two guys," and two witnesses testified to seeing defendant shoot twice in the direction of two males. From this testimony, the jury could reasonably determine that defendant fired at Moua and Fong, which would constitute an assault, i.e., an attempt with force or violence to harm them and with the intent of doing great bodily

harm to them. Thus, there was also sufficient evidence to support defendant's conviction of assault with intent to do great bodily harm to victim Moua.

We affirm.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Brian K. Zahra